



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 155
MS: 11-C07
Seattle, WA 98101-3140

OFFICE OF
REGIONAL COUNSEL

November 16, 2020

BY U.S. Mail and Email to (b) (6)

Charles Pillon
15753 Renton-Issaquah Road SE
Renton, Washington 98059

Re: Request for EPA Employee Affidavit in *Chuck Pillon v. King County, Washington*,
Superior Court of the State of Washington for King County, Docket # 20-2-12287-4 KNT

Dear Mr. Pillon,

I am responding to your emails to Kris Leefers, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region 10 ("EPA" or "Agency"), dated October 17, 19, and 29, 2020. You are the plaintiff in the above-referenced litigation regarding allegations of illegal seizure of protected pension funds, to which EPA is not a party. In your emails you request the voluntary affidavit in this lawsuit of Jeffrey Fowlow, an On-Scene Coordinator in the Emergency Management Branch of the Superfund and Emergency Management Division ("SEMD") within Region 10 of the EPA. You indicated you would send a draft affidavit but did not do so; rather, you explained in your emails some of the information you would want Mr. Fowlow to include in an affidavit to support your claim.

In your emails you state that you seek to have the Agency provide an affidavit from Mr. Fowlow regarding the activities undertaken by EPA at the May Creek Landfill Site, located on property you own in Renton, King County, Washington. Specifically, you indicate that "I simply need Jeff to affirm that he was the OSC at my place in November and December when EPA investigated the so called *"landfill area/debris field"* on the western side of my property...because of concerns by the State of Washington that it contained significant buried solid waste and actual hazardous material buried there." (Emphasis yours). You further state that "Jeff notes all of this in a narrative of a report he filed in the spring of 2019." Mr. Fowlow provided a copy of the EPA Final Trip Report to you that documents all of EPA's removal work on your property to address releases and threats of releases of hazardous substances into the environment.

EPA's *Touhy* regulations at 40 C.F.R. § 2.402(b) prohibit Agency employees from providing testimony, including written affidavits, "concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA," unless, *inter alia*, authorized by the General Counsel or his designee under 40 C.F.R. § 2.403. The purpose of these regulations is "to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving

testimony . . . when clearly in the interests of EPA.” 40 C.F.R. § 2.401(c). According to 40 C.F.R. § 2.403, when voluntary testimony or an affidavit by an EPA employee is requested under 40 C.F.R. § 2.402(b), the employee may provide testimony or an affidavit only when the General Counsel or his designee, in consultation with the appropriate Assistant Administrator, determines that compliance with the request would “clearly be in the interests of EPA.” As the designee of EPA’s General Counsel, I am responsible for making this determination.

I have reviewed your arguments and statements contained in your October 17, 19, and 29, 2020 emails and the recommendation of Mr. Fowlow’s supervisors and have consulted with the Regional Administrator of EPA Region 10. On this basis, I have concluded that compliance with the request would not clearly be in the interests of EPA. Furthermore, officials in SEMD have advised me that EPA may have a claim against you related to the cleanup actions undertaken by EPA at your property as discussed in your emails, and therefore participation in this litigation could negatively impact EPA’s interests in pursuing a cost recovery case against you in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act. Consequently, I have determined that this litigation concerns a matter purely among private litigants, the outcome of which will have no significant effect upon EPA’s programs, functions, or responsibilities. Providing official time for an Agency employee to provide an affidavit in this lawsuit would be an inappropriate use of EPA resources. In addition, providing this testimony could be perceived as a failure by the Agency to maintain impartiality among private litigants as required by 40 C.F.R. § 2.401(c). Because no Federal interest would be served by providing an affidavit, to do so would likely favor one or the other parties in the litigation, contrary to the regulatory proscription. Furthermore, you have already received a copy of the EPA Final Trip Report that contains all the details of the EPA cleanup work on your property overseen by Mr. Fowlow.

SEMD’s responsibilities include conducting assessments and cleanups of contaminated property through the remedial, removal, and emergency response programs. These responsibilities include conducting cleanup activities using federal funding and overseeing cleanup activities undertaken and funded by responsible parties, in addition to taking enforcement actions related to these matters. SEMD further coordinates and cooperates with response partners including Tribes, and state and local governments. These myriad relationships can result in disputes and litigation between and among responsible parties, Tribes, state, and local governments, which do not directly involve the interests of the United States. To interject the weight of the United States into private party litigation of this type would set a precedent for SEMD and for the Agency, and would lead to numerous similar requests that would interfere with the normal operations of SEMD and its responsibility to address the cleanup of contaminated properties.

In sum, Mr. Fowlow’s duties do not encompass providing affidavits in private lawsuits to which the United States is not a party. The outcome of the instant litigation will have no impact on EPA’s potential claim for cost recovery against you, or any other aspect of the Agency’s responsibility to address the cleanup of contaminated properties. Allowing such testimony would be burdensome and time consuming for Mr. Fowlow and would set a precedent that would interfere with the Agency’s responsibility to address the cleanup of contaminated properties.

Accordingly, I have determined that it is not clearly in EPA's interests to permit Mr. Fowlow to provide an affidavit as an Agency employee pursuant to your request.

If you have any questions concerning this matter, please contact Kris Leefers, Assistant Regional Counsel, at 206-553-1532 or leefers.kristin@epa.gov.

Sincerely,

BEVERLY LI Digitally signed by
BEVERLY LI
Date: 2020.11.17
14:50:18 -08'00'

Beverly Li
Regional Counsel
EPA, Region 10

Cc: Kris Leefers, Office of Regional Counsel
Calvin Terada, Director, Superfund and Emergency Management Division